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Access to Migrant Labor Camps: Marsh v. Alabama Revisited

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ACCESS TO MIGRANT LABOR CAMPS: *MARSH v. ALABAMA* REVISITED

Illinois Migrant Council v. Campbell Soup Co.
574 F.2d 374 (7th Cir. 1978)

Constitutional guarantees protecting private property rights[1] and those that protect freedom of expression[2] ordinarily will not conflict with one another. Since the restraints of the first and fourteenth amendments are addressed solely to the government,[3] the private citizen is not required to open up his property for free speech purposes. Therefore, while the speaker is entitled to the full range of first amendment freedoms on public property[4] he does not enjoy any of those rights on private property. Yet, when private property is quasi-public in nature[5] the question arises as to whether it should be treated as if it were public for first amendment purposes.

The company town[6] is the classic example of private property that

1. U.S. CONST. amend. V provides in pertinent part:

> [N]or shall private property be taken for public use without just compensation.

U.S. CONST. amend. XIV, §1 provides in pertinent part:

> [N]or shall any state deprive any person of . . . property, without due process of law.

2. U.S. CONST. amend. I states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The limitations of the first amendment are extended to the states through the fourteenth amendment.

3. *See* Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Civil Rights Cases, 109 U.S. 3, 11 (1883); Virginia v. Rives, 100 U.S. 313, 318 (1879).

4. Of course, the phrase "full range" does not mean that one has an absolute right to free speech. The state may impose reasonable time, manner, and place regulations on the exercise of first amendment rights. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 560 (1965) (picketing "in or near" a court "with the intent of interfering with, obstructing, or impeding the administration of justice," constitutionally prohibited).

5. For purposes of analysis, quasi-public property is defined to mean that private property which is either freely accessible to the public or is operated as a self-contained community for a significant number of persons.

6. Justice Powell, writing for the Court in Lloyd Corp. v. Tanner, 407 U.S. 551, 561-62 (1972), described the company town as follows:

> One must have seen such towns to understand that 'functionally' they were no different from municipalities of comparable size. They developed primarily in the Deep South to meet economic conditions, especially those which existed following the Civil War. Impoverished States, and especially backward areas thereof, needed an influx of industry and capital. Corporations attracted to the area by natural resources and abundant labor were willing to assume the role of local government. Quite literally, towns were built and operated by private capital with all of the customary services and utilities normally afforded by a municipal or state government: there were streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facili-

has been judicially recognized as an appropriate first amendment forum. One modern day counterpart is the agricultural labor camp.[7] In *Illinois Migrant Council v. Campbell Soup Co.*,[8] the United States Court of Appeals for the Seventh Circuit considered whether an outsider seeking to inform labor camp residents of various services and benefits available to them, enjoyed a first amendment right of access to the camp. Applying the strict "company town" doctrine[9] previously enunciated by the United States Supreme Court,[10] the Seventh Circuit found that the property in question was not the functional equivalent of a municipality and hence the campowner's actions were not subject to the restraints of the first and fourteenth amendments.[11] The opinion represents the first time that a state or federal court has subordinated first amendment rights to the property interests of a migrant labor camp operator.[12]

This comment will examine the Supreme Court decisions which led to the emergence of the labor camp cases, assess how other jurisdictions have handled the same problem, examine the facts on which *Campbell Soup* is based and analyze the opinion of the Seventh Circuit.[13] It will be shown that although the Seventh Circuit reached the correct result on the particular facts of the case, its failure to recognize and apply the underlying policy of the "company town" doctrine casts doubt upon the value of the decision as future precedent.

ties, and sometimes schools. In short, . . . [they] had 'all the characteristics of any other American town.'

7. Agricultural labor camps are similar to the company town because they, too, are often the functional equivalents of a municipality for their residents. Although the number of municipal-like services varies from one camp to the next, the typical camp provides most of the necessities for daily living from housing, dining and shopping facilities to fire protection, sewage disposal and recreation facilities. *See* cases cited at note 45 *infra*.

8. 574 F.2d 374 (7th Cir. 1978).

9. The "company town" doctrine enunciated by the Supreme Court in Marsh v. Alabama, 326 U.S. 501 (1946), states that where private property is functionally analogous to a municipality, it is subject to the first and fourteenth amendments. *See* the discussion of *Marsh* in the text accompanying notes 14-21 *infra*.

10. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

11. 574 F.2d at 378.

12. The Third Circuit's opinion in Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975), did not unequivocally deny a first amendment right of access to the camp. *Id.* at 138. *See* text accompanying note 56 *infra*.

13. The third issue addressed by the court, whether there was a statutory right of access, will not be discussed in this case comment. The Seventh Circuit did not find such a right. According to the court's reading of the statutes and legislative history, there was nothing to indicate that the purposes of the statutes were to be achieved by affording a right of access to private property. 574 F.2d 374, 379 (7th Cir. 1978). The statutes relied upon were 42 U.S.C. § 2861 (1964) and 29 U.S.C. § 801 (1973). *Contra*, State v. Shack, 58 N.J. 297, 304, 277 A.2d 369, 372 (1971) (purposes of federal benefit legislation would not be achieved "if the intended beneficiaries could be insulated from efforts to reach them").

HISTORICAL BACKGROUND

The landmark case sustaining first amendment rights of expression on private property is *Marsh v. Alabama*.[14] In that case, Mrs. Marsh, a Jehovah's Witness, attempted to distribute religious literature on the business block of Chickasaw, Alabama, a town owned entirely by the Gulf Shipbuilding Corporation.[15] Mrs. Marsh was told that she could not distribute the literature without a permit and that permission would not be granted her. When Mrs. Marsh refused to leave, she was arrested and convicted of criminal trespass.

Justice Black, writing for the majority, recognized that "had the title to Chickasaw belonged not to a private but to a municipal corporation . . . it would have been clear that appellant's conviction must be reversed."[16] Thus, the issue before the Court was whether freedom of the press and religion could be denied to those who lived in or came to Chickasaw merely because title to the property was vested in a private corporation.[17] In holding that first amendment principles applied to Chickasaw,[18] Justice Black devised a legal fiction to satisfy the necessary nexus between the corporation and the state. Since Chickasaw contained "all the characteristics of any other American town,"[19] and was "accessible to and freely used by the public in general,"[20] the Court felt justified in treating the property as if it were a typical public fo-

14. 326 U.S. 501 (1946).

15. Justice Black described the town as follows:

> The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Id. at 502-03.

16. *Id.* at 504.

17. *Id.* at 505.

18. *Id.* at 508.

19. *Id.* at 502. *See* note 15 *supra*.

20. *Id.* at 503.

rum.[21]

In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[22] the Supreme Court extended the rationale of *Marsh* from the setting of a company town to that of a shopping center. In *Logan Valley*, union members set up a picket line in front of the Weis Supermarket, a store located in the Logan Valley Mall, to protest Weis's employment of a wholly non-union staff of employees. The picketing was peaceful at all times and did not interfere with the commercial activity of the store. Both Weis and the shopping center sued the picketers for criminal trespass and the trial court granted an order permanently enjoining the union from picketing within the center.[23]

The injunction was overturned by the Supreme Court.[24] Justice Marshall, writing for the majority, identified the issue presented in *Marsh* to be whether Mrs. Marsh had a first amendment right to pass out leaflets in the *business district* of Chickasaw.[25] Upon this assessment of *Marsh*, Justice Marshall concluded:

> [B]ecause the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' . . . the state may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[26]

In a footnote to this holding, the Court expressly reserved judgment on whether there would have been a first amendment violation if the speech had been unrelated to the purpose for which the property was being used.[27]

This unrelated speech issue came before the Court four years later in *Lloyd Corp. v. Tanner*,[28] where anti-war protesters had been en-

21. The Court indicated that the state's enforcement of the trespass action, as well as the state's delegation of power to govern a community of citizens constituted the requisite state action. In so doing the Court stated: "Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." *Id.* at 509. For a critical review of the literature as well as a discussion of the entire state action concept *see* Black, *Foreward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

22. 391 U.S. 308 (1968).

23. *Id.* at 312.

24. *Id.* at 325.

25. *Id.* at 318 (emphasis added). Justice Marshall reasoned that although Gulf Shipbuilding Corporation's power to prevent trespass extended to the residential areas of the community, "there was no showing made in [*Marsh*] that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town . . . . [T]he specific facts in [*Marsh*] involved access to property used for commercial purposes." *Id.*

26. *Id.* at 319-20 (quoting, in part, Marsh v. Alabama, 326 U.S. 501, 508 (1946)).

27. *Id.* at 320 n.9.

28. 407 U.S. 551 (1972).

joined from distributing handbills within a privately owned shopping mall.[29] Although the Lloyd Center was closely analogous to a municipal business district due to its size, its variety of stores, and its accessibility to the general public,[30] the *Lloyd* Court refused to sustain first amendment rights on the property.[31] However, it is not clear from the opinion whether the Court had intended to overrule *Logan Valley*.[32]

Clearly, the *Lloyd* Court disapproved of the broad interpretation of *Marsh*. Quoting from Justice Black's dissenting opinion in *Logan Valley*, the Court stated: "[T]he basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town . . . ."[33] Since the shopping center was not the functional equivalent of a municipality, the *Lloyd* Court reasoned that *Marsh* could not be used to sustain first amendment rights within the Lloyd Center.[34] At this point, *Lloyd* appeared to overrule *Logan Valley*, but the remainder of the opinion was devoted to distinguishing the facts of the two cases. First, it was noted that the picketing in *Logan Valley* was related to the use of

29. Lloyd Center enforced a policy against *all* distribution of handbills within the building complex. *Id.* at 555.

30. The center embraced approximately fifty acres and housed nearly sixty stores in an enclosed mall. Lloyd Corporation had pursued several policies to attract shoppers to the center. Various groups and organizations were permitted to use the auditorium, as were presidential candidates of both parties. The American Legion and the Salvation Army were free to solicit contributions within the malls. 407 U.S. at 555.

31. *Id.* at 569-70.

32. For a discussion of the continuing validity of *Logan Valley* after *Lloyd Corp., see generally* Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977); Note, *The Public Forum from Marsh to Lloyd*, 24 AM. U.L. REV. 159 (1974); Note, *Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh*, 61 GEO. L.J. 1187 (1973).

33. 407 U.S. 551, 563 (1972) (quoting Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 330-31 (1968) (Black, J., dissenting)).

34. In comparing the shopping center to the company town, Justice Powell stated: "In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal *functions* or *power*." *Id.* at 569 (emphasis added).

The Court appears to use the words "functions" and "power" synonymously. A distinction should, however, be drawn between the two for purposes of analyzing whether a private entity's conduct is subject to the restraints of the first and fourteenth amendments. In Marsh v. Alabama, 326 U.S. 501 (1946), the company was exercising municipal functions by providing streets, sidewalks, a system of sewers and postal services. It also had assumed municipal-like power because its totality of ownership enabled it to control the flow of information to the community. However, there are situations, such as the migrant labor camp, in which a private entity may not exercise all the *functions* of a municipality or company town but nonetheless still enjoy the *power* to control the flow of communication to those who reside on or use the property. It seems fair to conclude that under these circumstances the assumption of government-like power alone is sufficient to satisfy the state action requirement of the first and fourteenth amendments. *See generally* Berle, *Constitutional Limitations on Corporate Activity - Protection of Personal Rights from Invasion of Economic Power*, 100 U. PA. L. REV. 933 (1952).

the property involved, whereas the handbilling in *Lloyd* was addressed to the public in general.[35] Second, the Court pointed out that as a result of the general content of their message, the *Lloyd* plaintiffs could have made use of alternative avenues for communicating their message to the intended audience.[36]

In effect, the *Lloyd* Court had circumvented the state action issue by adopting a two-pronged test for accommodating the private property rights of a shopping center owner with another's first amendment rights. Following *Lloyd*, first amendment rights would prevail if the communication is related to the use of the property and if alternative avenues of communication are unavailable. Thus, although *Lloyd* had ostensibly limited *Marsh* to its facts, the opinion did not completely reject the notion that a privately owned shopping center can be treated as if it were public for first amendment purposes. However, the first prong of the *Lloyd* analysis was to be rejected shortly thereafter in the most recent shopping center case to be heard by the Supreme Court.

In *Hudgens v. NLRB*[37] warehouse employees of the Butler Shoe Company protested contract negotiations by picketing one of the company's retail stores. The store they picketed was located in a privately owned shopping center.[38] The picketers departed upon being threatened with arrest for criminal trespass. When the case reached the United States Supreme Court, the basic question for review was whether the respective rights and liabilities of the parties should be governed under the criteria of the National Labor Relations Act alone, under a first amendment standard, or some combination of the two.

In addressing this issue, the Court first undertook a review of *Marsh* and its progeny. Because *Lloyd* had stated that *Marsh* was intended to apply only in those situations where the private enterprise had assumed all the attributes of a state-created municipality,[39] the *Hudgens* Court concluded that the *Logan Valley* doctrine did not survive the Court's decision in *Lloyd*.[40] Even though *Marsh* had been neatly limited to its facts, the Court could still have used *Lloyd* to find a

35. 407 U.S. 551, 564 (1972).
36. *Id.* at 566-67.
37. 424 U.S. 507 (1976).
38. The Butler warehouse was not located within the shopping center. *Id.* at 509 n.1.
39. *See* text accompanying notes 33-34 *supra*.
40. 424 U.S. 507, 518 (1976). In a dissenting opinion, Justice Marshall insisted that the two opinions were reconcilable, stating:

> [*Lloyd*] preserved the holding of *Logan Valley*, as limited to cases in which (1) the picketing is directly related in its purpose to the use to which the shopping center property is put, and (2) 'no other reasonable opportunities for the picketers to convey their message to their intended audience [are] available.'

Id. at 536 (Marshall, J., dissenting, quoting 407 U.S. at 563).

first amendment right to picket in a privately owned shopping center. Instead, the Court held that the first prong of the *Lloyd* analysis, dealing with the content of the speech, was unconstitutional because it made first amendment rights dependent on the nature of the message.[41] However, the Court then relied on *Lloyd* to support its conclusion, when Justice Stewart stated:

> [I]f the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.[42]

Having determined that the first amendment had no part to play in the case, the *Hudgens* Court remanded the case to the court of appeals with directions to remand to the National Labor Relations Board for consideration pursuant to the statutory criteria of the National Labor Relations Act alone.[43]

Thus, the history of the "company town" doctrine has gone full circle to a reaffirmation that *Marsh* is to be narrowly construed. Yet, for many years prior to this final enunciation, the "company town" doctrine had encouraged a struggle between private property interests and free speech rights. One battleground has been the private migrant labor camp.

THE MIGRANT LABOR CAMP CASES

Migrant farm workers are among the lowest paid, least educated, worst fed, and worst housed people in the United States.[44] Either by

41. Justice Stewart stated: " '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " 424 U.S. at 520 (quoting Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972)). Justice Marshall took exception with the majority on this issue. In his dissenting opinion, he contended that the cases relied on by the majority were inapposite because they involved the suppression of speech by the state. Justice Marshall agreed with the Court that where the government acts to suppress speech, it cannot do so on the basis of content alone. But where quasi-public property and first amendment rights conflict, Justice Marshall believed that the latter must prevail if no effective alternative avenues of communication exist. His theory is that to determine if any alternatives exist, we must, in part, examine the content of the speech involved. Thus, in *Logan Valley*, Justice Marshall found it especially significant that the speech involved the picketing of a single store located within the shopping center. *See also* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (employer cannot prohibit union from distributing literature to employees on the premises when other channels of communication are inadequate) (dicta).

42. 424 U.S. 507, 520-21 (1976).

43. *Id.* at 523.

44. duFresne & McDonnell, *The Migrant Labor Camps: Enclaves of Isolation in Our Midst*, 40 FORDHAM L. REV. 279, 280 (1971). The literature on the plight of the migrant workers is extensive. *See generally* SUBCOMM. ON MIGRANT LABOR OF THE SENATE COMM. ON LABOR & PUBLIC WELFARE, THE MIGRATORY FARM LABOR PROBLEM IN THE U.S., S. REP. No. 83, 91st Cong. 1st Sess. (1970); Sherman & Levy, *Free Access to Migrant Labor Camps*, 57 A.B.A.J. 434

the terms of their employment or as a result of their social and financial status, migrant farm workers ordinarily live in a labor camp during the harvest. These camps are often encircled by barbed wire fences and "No Trespassing" signs to keep visitors away. In the typical case, the camp operator, in the name of property rights, denies a union organizer or representative of a public interest organization the right to communicate with the migrant workers on the camp premises.

In cases where those denied entry have sued alleging a violation of their first and fourteenth amendment rights, the overwhelming majority of the courts have ruled in favor of a right of access,[45] but have offered a variety of rationales for their decisions. For purposes of analysis, these rationales will be labeled the "company town" test, the landlord/tenant rationale and the balancing approach.

The "Company Town" Test

Prior to *Campbell Soup*, two other cases had been decided at the federal appellate level.[46] In *Petersen v. Talisman Sugar Corp.*,[47] representatives for the United Farm Workers Union attempted to enter a privately owned sugar plantation for union related purposes.[48] The company invoked a Florida trespass statute,[49] and the UFW people were arrested for criminal trespass.

On appeal, the Fifth Circuit held that the imposition of the trespass statute was the equivalent of state action and therefore the union's first amendment rights had been abridged. The court reasoned that the labor camp was closely analogous to the traditional company town since "[i]t was a self-contained community in which municipal services were afforded for a thousand migrants . . . from fire protection and

(1971); Chase, *The Migrant Farm Worker in Colorado - The Life and the Law*, 40 U. COLO. L. REV. 45 (1967).

45. *See* Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 437 F. Supp. 60 (S.D.N.Y. 1977); Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974); UFW v. Mel Finerman Co., 364 F. Supp. 326 (D. Col. 1973); Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972); Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); State v. Fox, 82 Wash. 2d 289, 510 P.2d 230 (1973), *cert. denied*, 414 U.S. 1130 (1974); People v. Rewald, 65 Misc. 2d 453, 318 N.Y.S.2d 40 (1971); State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971). *But see* Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975) (first amendment right of access denied because plaintiffs failed to prove that alternative avenues of communication were not available).

46. *See* Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973).

47. 478 F.2d 73 (5th Cir. 1973).

48. The United Farm Workers Union will hereinafter be referred to as the UFW. The UFW representatives were attempting to substantiate reports that the company had been illegally employing migrant canecutters as field equipment operators. They also wanted to present the workers with information about the union's religious organizations. *Id.* at 77.

49. FLA. STAT. ANN. § 821.01 (1973) (repealed by Laws 1974, ch. 74-383, § 66).

postal services to sewage, and garbage disposal, and electric services."[50]

Having satisfied the threshold question of state action, the Fifth Circuit tested the reasonableness of the Talisman Corporation's restraints through use of a *Lloyd*-like balancing scheme. Since no effective alternatives were available to the plaintiffs,[51] the company was required to "accommodate its property rights to the extent necessary to allow the free flow of ideas and information between the plaintiffs and the migrants."[52]

The *Lloyd* analysis was also applied in another pre-*Hudgens* decision, albeit for a different purpose, by the Court of Appeals for the Third Circuit in *Asociacion de Trabajadores de Puerto Rico v. Green Giant Co.*[53] Because the Green Giant camp was not open to the general public, the Third Circuit concluded that the company "need not permit automatic and wholesale entry by all who assert First Amendment rights."[54] Yet, since the camp was akin to a company town in several respects, the court reasoned that if the plaintiffs were to satisfy the two-pronged *Lloyd* analysis, their first amendment rights would prevail over Green Giant's property interests.[55] Ultimately, a first amendment right of access was denied because the plaintiffs had failed to prove the unavailability of reasonable alternatives for contacting the migrants.[56]

Finally, in a post-*Hudgens* case, a federal district court used the "company town" test to sustain first amendment rights within a migrant labor camp. In *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*,[57] a legal services corporation sought to enjoin a corporate farm from de-

50. 478 F.2d 73, 82 (5th Cir. 1973). The court also distinguished the shopping center cases on the basis of the number of municipal-like services performed by the labor camp. The lack of privately supplied postal services and garbage collections in the typical shopping center were specifically pointed out. *Id.*

51. Due to the lack of their own transportation, a language barrier and limited financial resources, the Jamaican workers were only able to leave the camp every other Saturday. The court found the bi-weekly excursions to be insufficiently frequent for discussions with the workers. *Id.*

52. *Id.* at 83. It was noted that the owner-employer could establish reasonable regulations so that visitors would not interfere with daily business operations.

53. 518 F.2d 130 (3d Cir. 1975). As part of an organizing campaign, labor union officials sought access to Green Giant's asparagus farm which housed 900 Puerto Rican laborers. When threatened with prosecution for criminal trespass, the labor union initiated a class action for injunctive and declaratory relief to assure a guaranteed right of access. *Id.* at 133.

54. *Id.* at 138.

55. *Id.*

56. *Id.* However, the court acknowledged that since the facts in the case were not fully developed, it was impossible to say whether plaintiffs might later prove a first amendment right of access. *Id.* at 140 n.35. For a critical review of the Third Circuit's opinion in *Green Giant see* Comment, *The Bill of Rights, State Action, and Private Migrant Labor Camps*, 1976 UTAH L. REV. 214.

57. 437 F. Supp. 60 (S.D.N.Y. 1977).

nying it access to the farm for the purpose of informing the workers of their rights. The district court held that since the camp contained the "hallmarks of a 'company town,' " plaintiffs were entitled to reasonable access to the property.[58]

The courts that have used the "company town" test have done so because in their estimation the particular labor camp was more analogous to the company town than not. But, as noted in the *Green Giant* opinion, the company town in *Marsh* was open to the general public. Since free ingress and egress is a characteristic foreign to most labor camps, the "company town" test is not without its shortcomings.

The Landlord/Tenant Rationale

A second line of cases illustrates the use of a landlord/tenant rationale to assure a right of access to migrant labor camps.[59] The basic premise underlying this rationale is a fundamental tenet of real property law: a tenant has the right to receive visitors at his own discretion.[60] In most instances, however, the migrants do not give consideration for their housing. Therefore, they usually cannot be classified as tenants.[61] However, as demonstrated in the opinions of two federal district courts, this problem is easily circumvented. In *Folgueras v. Hassle*,[62] the court found the requisite consideration by reasoning that one justification for the migrant's extremely low wages was the company's provision of free housing.[63] And, in *Franceschina v. Morgan*,[64] the concept of consideration was even more liberally construed. It was found that the free rent lured the migrants to the camp and the migrants in turn ensured the flow of crops to the canneries.[65]

58. *Id.* at 62. The court did not explain what it meant by "hallmarks" and no description of the camp appears in the opinion.

59. *See* Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972); Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); State v. Fox, 82 Wash. 2d 289, 510 P.2d 230 (1973), *cert. denied*, 414 U.S. 1130 (1974).

60. *See* Gordon County Broadcasting Co. v. Chitwood, 211 Ga. 544, 87 S.E.2d 78 (1955); Konick v. Champneys, 108 Wash. 35, 183 P. 75 (1919) (also stressed the corollary principle that the landlord has no right to prohibit a tenant's visitors from coming on the premises).

61. For a critical analysis of the landlord/tenant rationale, *see* Note, *First Amendment and the Problem of Access to Migrant Labor Camps after Lloyd Corp. v. Tanner*, 61 CORNELL L. REV. 560, 563 (1976).

62. 331 F. Supp. 615 (W.D. Mich. 1971).

63. *Id.* at 624.

64. 346 F. Supp. 833 (S.D. Ind. 1972).

65. *Id.* at 838.

The Balancing Approach

As the above discussion indicates, the landlord/tenant rationale enables the court to decide the access issue without having to encounter the difficulties of locating the state action that is inherent in the "company town" test. Another way the courts have circumvented the state action problem is through an ad hoc balancing of the camp operator's property interests on the one hand and the free speech rights of the migrant workers on the other. This typically involves assessing both the right of the camp operator to keep his land free from unwarranted intrusions and his interest in assuring the stability of his business operations, and juxtaposing these interests against those of the migrant worker to have access to information and, in general, to lead a dignified life. Each court that has employed a balancing scheme has concluded that the campowner's property rights do not include a license to suspend the migrant residents' constitutional right to be properly informed.[66] The rationale of this conclusion was stated best by the New Jersey Supreme Court in *State v. Shack*:[67]

> Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.[68]

Although the *Shack* court had struck a balance in favor of a right of access to the camp, the court did not intend by its holding to open the camp to all who might wish to enter. Rather, the court stated: "[W]e do not say, for example, that solicitors or peddlers of all kinds may enter on their own; . . . the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant workers of practical access to things he needs."[69]

Although at first glance the balancing approach appears to be very compelling because it encourages judgments founded upon general principles of equity and fairness, it does not create firm guidelines by which other courts may assess the respective rights of the parties in-

66. *See* Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974); UFW v. Mel Finerman Co., 364 F. Supp. 326 (D. Colo. 1973); Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971); People v. Rewald, 65 Misc. 2d 453, 318 N.Y.S.2d 40 (1971).

67. 58 N.J. 297, 277 A.2d 369 (1971).

68. *Id.* at 303, 277 A.2d at 372.

69. *Id.* at 308, 277 A.2d at 374.

volved. Therefore, it must be recognized that the fairness inherent in the balancing approach is a weakness as well as a strength.

ILLINOIS MIGRANT COUNCIL V. CAMPBELL SOUP CO.

The property involved in *Campbell Soup* is a 201 acre mushroom farm known as Prince Crossing, Illinois.[70] The property consists of a residential area that houses eighty-eight Spanish-speaking migrant workers.[71] This area includes a store,[72] dining hall, and multi-purpose building. The company provides fire extinguishers and a hydrant,[73] garbage and sewage disposal and enforces a disciplinary code on the property.[74] Police protection is provided by the DuPage County Sheriff's Office.

The Illinois Migrant Council[75] is a not-for-profit corporation[76] that provides educational,[77] health[78] and vocational[79] services to migrant and seasonal workers in Illinois. Roy Villareal, the regional director of the IMC office in Joliet, Illinois, attempted to visit the residents of Prince Crossing on the company property to inform them of the various state, federal and IMC services and benefits available to them. The company denied Villareal access to the farm.

IMC and Villareal brought suit in the United States District Court, seeking declaratory and injunctive relief and punitive and actual dam-

70. Prince Crossing is approximately one mile from the nearest town, West Chicago, Illinois. The farm is entirely surrounded by other private lands. It is bisected by a single rural county road; company owned roads lead from the county road to the farming and residential areas of the community. *See* Illinois Migrant Council v. Campbell Soup Co., Brief for Plaintiffs-Appellees at 7.

71. The residents of Prince Crossing are predominantly Mexican citizens who have permanent resident status in the United States. No resident has completed more than nine years of education and fifty percent have six years or less of schooling. The migrant workers are, for the most part, unskilled agricultural laborers. They work nine hours per day, Monday through Saturday. Their incomes vary but the available data indicate that approximately twenty percent earn less than five thousand dollars annually. Brief for Plaintiffs-Appellees at 11-12.

72. The store only carries surplus Campbell canned goods. The residents must shop in the neighboring towns for daily necessities. 574 F.2d at 378.

73. Affidavits of the residents indicated, however, that if a fire occurred they would call the West Chicago Fire Department. *Id.* at 377.

74. The code only applies to company employees and thus does not apply to forty percent of Prince Crossing's residents. Sanctions for violations of the code are work related. *Id.*

75. Hereinafter referred to as IMC.

76. IMC receives federal funding pursuant to the Economic Opportunity Act, 42 U.S.C. §§ 2701 - 2996 (1964) and the Comprehensive Employment and Training Act, 29 U.S.C. §§ 801 - 992 (1973).

77. IMC's programs include adult education, consumer education and high school equivalency courses. Brief for Plaintiffs-Appellees at 5-6.

78. IMC counsels farmworkers on preventive health care and occupational diseases. Brief for Plaintiffs-Appellees at 6.

79. Upon completion of the educational vocational training programs, IMC places the migrant workers in better paying skilled employment positions. Brief for Plaintiffs-Appellees at 5.

ages.[80] The gravamen of IMC's complaint was that by refusing to permit an IMC representative to enter Prince Crossing, the Campbell Soup Company had violated IMC's rights and the rights of the Prince Crossing residents as guaranteed by the first and fourteenth amendments.[81] The company moved to dismiss the complaint for failure to state a claim. In sustaining the motion, the district court found that the failure of the plaintiffs to specifically allege that the company provided police protection, sewage disposal and postal and shopping facilities constituted an implicit admission that the company did not maintain such services.[82] Accordingly, the court held that Prince Crossing did not possess sufficient public characteristics to satisfy the state action requirement of 42 U.S.C. § 1983[83] and the first and fourteenth amendments.[84]

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the decision of the lower court. Reviewing the allegations of the complaint "in the light most favorable to [IMC],"[85] the Court of Appeals concluded that the plaintiffs had stated facts from which it could be inferred that Prince Crossing was a company town.[86] In so holding, the Seventh Circuit stressed that size alone was not the central concern in applying the "company town" doctrine. The court noted:

80. Illinois Migrant Council v. Campbell Soup Co., No. 74 C 2619 (N.D. Ill. 1974) (unpublished opinion).

81. *Id.*

82. *Id.*

83. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

84. Illinois Migrant Council v. Campbell Soup Co., No. 74 C 2619 (N.D. Ill. 1974) (unpublished opinion).

85. Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391, 394 (7th Cir. 1975) (*citing* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

86. The specific language of the court was as follows:

> The plaintiffs' complaint alleged that the Company operated a residential community for 150 persons - providing them with the basic facilities needed, including a work place, residences, a store, a cafeteria and a recreational building. The complaint further alleged that the Company enforced a no-trespass policy, from which it would be quite reasonable to infer that the Company had some means of enforcing its no-trespass rules. It would further seem reasonable to infer that a community of 150 persons, located some miles from any other town, must have some means of protecting itself from crime and fire, and must have some means of disposing of its sewage. In sum, in our view, the plaintiffs' complaint alleged sufficient facts upon which it could be concluded that the Campbell Soup Company's town of Prince Crossing was a company town within the meaning of *Marsh v. Alabama*, and accordingly when the defendant Company acted, it did so under color of state law.

519 F.2d at 395.

> The town of Chickasaw was large, Prince Crossing is small, but we think size alone is not the important criterion by which to evaluate whether the town has sufficient public residential characteristics as to constitute state action. *Rather the question is whether Prince Crossing serves as a functional equivalent of a municipality for its residents.*[87]

The case was remanded to the district court to permit IMC to prove that the camp was a company town within the meaning of *Marsh*, thus satisfying the state action requirement of section 1983 and the first and fourteenth amendments.

On remand, the district court found that the Campbell Soup Company had provided enough municipal-like services to satisfy the "company town" test as defined in *Marsh*.[88] Thus, the court concluded that when the defendant acted to prevent IMC from exercising its free speech rights within the farm, it had done so "under color of state law."[89] Again, it was emphasized "that a community [need not] have *all* of the attributes of a state created municipality" to satisfy the "company town" test.[90] An order permanently enjoining the company from denying IMC access to the farm was issued.

On appeal to the Seventh Circuit, this injunction was vacated. Following the United States Supreme Court's decision in *Hudgens v. NLRB*,[91] which had been decided subsequent to the time the Seventh Circuit first reviewed the *Campbell Soup* case, the Seventh Circuit chose to interpret *Marsh* very narrowly. The court compared Prince Crossing to Chickasaw, Alabama, the town in *Marsh*, and concluded that since fire and police protection were not provided by the company, and because nothing comparable to a business district existed within the camp,[92] Prince Crossing was not the functional equivalent of a

87. *Id.* at 394 (emphasis added).

88. The court reasoned as follows:

> The community at its center is at least a mile away from the nearest town. The company provides a rudimentary system of fire protection through fire extinguishers, a central fire hydrant, and water hose. It provides residents with sewage disposal; and it furnishes water from a company owned well. Prince Crossing has outside lighting, a central heating plant, an athletic field, recreational facilities, electricity, garbage collection, snow removal, and the common amenities found in any municipality. More important is the fact that the company enforces a disciplinary code in Prince Crossing, and metes out penalties through a system it administers. From these uncontested facts, there can be only one conclusion: that Prince Crossing is a company town within the meaning of *Marsh v. Alabama*.

438 F. Supp. 222, 227 (N.D. Ill. 1977).

89. *Id.* at 226.

90. *Id.* (emphasis added).

91. 424 U.S. 507 (1976). *See* text accompanying notes 37-43 *supra* for a discussion of *Hudgens*.

92. In evaluating Prince Crossing under the "company town" doctrine, the Seventh Circuit stated: "In our analysis we compare Prince Crossing's shopping district to that of a municipality of similar size, and not to that of the town in *Marsh*." 574 F.2d at 377.

company town.[93]

IMC argued in the alternative that in those instances where the property does not satisfy the "company town" test, but is nonetheless quasi-public,[94] *Lloyd Corp. v. Tanner*[95] guarantees a constitutional right of access if the speech is related to the use of the property and if no alternative avenues for communication exist. The Seventh Circuit rejected this argument on the belief that the Supreme Court in *Hudgens* had declared the first prong of the *Lloyd* analysis unconstitutional.[96]

ANALYSIS OF THE SEVENTH CIRCUIT APPROACH

As the above recital discloses, the history of *Campbell Soup* has been a history of shifting positions on the part of the United States Court of Appeals for the Seventh Circuit. The major distinction between the first and second Seventh Circuit opinions is that in the former the court compared Prince Crossing to a municipality of comparable size whereas in the latter the court employed the prototype of a company town as its measuring stick.[97] Thus, the Seventh Circuit, in its most recent review of *Campbell Soup*, digressed into a quantitative evaluation of the "company town" doctrine and ignored the policy that is the strength of the *Marsh* opinion.

Although in *Marsh* the Supreme Court had described at length the bevy of municipal-like functions the Gulf Shipbuilding Corporation was performing,[98] the specific *number* of those functions was only important to the extent that they conferred on Gulf the capacity to materially affect the first amendment rights of those in the community.[99] In other words, because the corporation owned all the "public" places traditionally associated with exercise of expressive rights, the corporation had the capacity to cut off the flow of information to the town's residents. Thus, Justice Black concluded that "[t]he managers appointed by the corporation cannot curtail the liberty of press and religion consistently with the purposes of the Constitutional guarantees."[100]

93. *Id.* at 378.

94. For the definition of "quasi-public" property, *see* note 5 *supra*.

95. 407 U.S. 551 (1972). *See* text accompanying notes 28-36 *supra* for a discussion of *Lloyd*.

96. 574 F.2d at 378.

97. Curiously, the court continued to maintain that the shopping district of Prince Crossing should be juxtaposed with one in a municipality of comparable size to Prince Crossing. 574 F.2d at 377.

98. *See* note 15 *supra*.

99. It is for this reason that Justice Black wrote: "[W]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that *the channels of communication remain free*." 326 U.S. 501, 507 (1946). *See also* Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977); Note, 86 HARV. L. REV. 122 (1972); Comment, 7 GA. L. REV. 177 (1972).

100. 326 U.S. at 509.

In failing to appreciate the interrelationship between privately supplied municipal services and first amendment expressive rights, the Seventh Circuit's analysis resulted in a formalistic rather than a substantive interpretation of the "company town" doctrine. By comparing Prince Crossing to Chickasaw, the court placed primary emphasis on the number of municipal-like services the company was providing, and in so doing, effectively held that no small migrant labor camp can be subject to the principles of the first and fourteenth amendments. Following *Campbell Soup*, if a labor camp provides a broad range of municipal-like services and yet does not maintain the functional equivalent of a municipal fire and police department, it cannot be treated as an appropriate first amendment forum. The effect of this formalistic interpretation of *Marsh* might very well be a worsening in the already impoverished living conditions of the migrant farmworker. As long as a first amendment right of access is dependent upon the number of municipal-like services a camp contains, it will be to the advantage of the owners of the larger camps to provide fewer services to the migrant worker.

Curiously, the Seventh Circuit felt constrained by *Hudgens* to apply this narrow interpretation of *Marsh*. Although the *Hudgens* Court indicated its approval of limiting *Marsh* to its facts,[101] the Seventh Circuit could have easily distinguished *Hudgens* on the basis of the differing first amendment consequences a shopping center and migrant labor camp portend for those who use the properties. In the case of the former, since those who use a shopping center do not reside there, the center's proprietor is ordinarily not in a position to cut off their access to information. In contrast, the migrant labor camp, like the company town, serves as a residential community where dozens if not hundreds of people spend their working and leisure time. Accordingly, the campowner is more likely to have the capacity to control the flow of information to the camp residents than is his shopping center counterpart.[102]

101. *See* 424 U.S. 507, 519 (1976).

102. In his dissenting opinion in the *Lloyd* case, Justice Marshall suggested that the shopping center owner does indeed have the ability to control the channels of communication. Justice Marshall stated:

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent.

407 U.S. 551, 581 (1972) (Marshall, J., dissenting).

The *Marsh* "company town" holding should provide the test for determining whether first amendment rights can be sustained within a private migrant labor camp. However, the inquiry should be into the *nature* of the camp proprietor's ownership rather than the *number* of municipal-like services he performs.[103] It is suggested that this focus represents a substantive rather than a formalistic reading of *Marsh* and provides a more equitable approach to the migrant labor camp cases than does the strict "company town" evaluation.

In analyzing the *nature* of a camp proprietor's ownership, the focal point should be the availability of alternative avenues of communication.[104] Thus, if the campowner does not control all the avenues for effective communication with the workers, he would be entitled to deny outsiders a right of access to the farm. It should be noted that this conclusion will not be unduly harsh because it presumes that the camp residents have other reasonable means by which they can receive information. On the other hand, if the campowner has the ability to effectively control the flow of information to the workers, then he possesses government-like power analogous to that of the corporation in *Marsh* and consequently should not be permitted to deny outsiders a right to enter the property. This, too, is a reasonable result because if the government is constitutionally prohibited from realizing its inherent power to cut off the flow of information to its citizens, a private entity that has a similar capacity should likewise be denied the right to exercise this power.[105]

Applying this suggested test to the facts in *Campbell Soup*, it is seen that in spite of the Seventh Circuit's formalistic interpretation of *Marsh*, the court did reach the correct result. Because the residents of Prince Crossing found it necessary to frequent the West Chicago Community for a variety of needs and were, in fact, an integral part of that community, IMC representatives could have conveyed their information to the workers off the premises and with relatively little inconve-

103. *See also* Comment, *The Bill of Rights, State Action, and Private Migrant Labor Camps*, 1976 UTAH L. REV. 214. For a critical analysis of other theories of state action that might be appropriate to the labor camp cases *see* Spriggs, *Access of Visitors to Labor Camps on Privately Owned Property*, 21 U. FLA. L. REV. 295 (1969).

104. This is, of course, the second prong of the *Lloyd* analysis. It should be noted that this part of the *Lloyd* opinion was left unscathed by the *Hudgens* decision. In *Hudgens* the Supreme Court only addressed its analysis to an evaluation of the related-to-the-use test—the first prong in *Lloyd*. *See* 424 U.S. 507, 520 (1976).

105. *See* note 34 *supra*. Of course, once it is determined that the property is an appropriate first amendment forum, the property owner should still be allowed to impose reasonable regulations on those seeking to use his property for expressive purposes.

nience.[106] Therefore, a substantive reading of *Marsh* reveals that reasonable alternative avenues of communication were available to IMC and consequently yields the same conclusion as the one reached by the Seventh Circuit: that when the company acted, it did not do so under color of state law. Hence there was no abridgement of the plaintiffs' first amendment rights.

CONCLUSION

In *Campbell Soup*, the United States Court of Appeals for the Seventh Circuit failed to apply the substance or policy of the *Marsh* "company town" holding. Although the Supreme Court in *Hudgens* rejected an extension of *Marsh*, the Seventh Circuit could have distinguished *Hudgens* because the proprietor of a migrant labor camp, unlike one of a shopping mall, often has the ability to cut off the flow of information to those who use his property. When this happens, the policy of *Marsh* dictates that the property is an appropriate first amendment forum. By focusing entirely on the factual characteristics of *Marsh*, the Seventh Circuit's approach could very well delegate to many migrant labor camp operators the power to cut off the flow of information to people in their homes, a severe encroachment upon first amendment rights.

FREDERICK KAPLAN

106. *See* Brief for Defendant - Appellant at 29, Illinois Migrant Council v. Campbell Soup Co., 574 F.2d 374 (7th Cir. 1978). In this brief Campbell Soup stated:

> The sworn statements of Prince Crossing residents, local educators, the Mayor of West Chicago, and a leader of the West Chicago Spanish-speaking community all confirm that the municipality to which Prince Crossing residents belong and into which such residents are fully integrated is the greater West Chicago community. Prince Crossing residents *actively* participate in West Chicago's educational, social, civic, sports and business life. They read newspapers, listen to radio and television, read posters, flyers and other forms of written advertisements directed to them from the greater West Chicago community, as well as from other communities within the Metropolitan Chicago Area. Indeed, Prince Crossing residents rely on the greater West Chicago community for such crucial municipal services as medical treatment, education, crime prevention, and fire protection. Prince Crossing residents similarly rely on the greater West Chicago community for food, clothing, entertainment, and religion.